No. 93-834

Supreme Court, U.S.
DEC 28 1993
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IN THE

Supreme Court of the United States

October Term, 1993

SHANDON INC., et al.,

Petitioners,

v.

MILES LABORATORIES, INC., et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BEST AVAILABLE COPY

RULE 29.1

The parent of respondent Miles Laboratories Inc., now known as Miles Inc., is Bayer AG.

The subsidiaries of Miles Inc. in which there are outside interests are:

Miles India Ltd.

Miles-Sankyo Co., Ltd.

Sucromiles, S.A.

Technicon Instruments Co., Ltd.

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OPPOSITION TO PETITION FOR CERTIORARI

I. Summary of Reasons for Denying the Writ

A. The "Question Presented for Review" submitted by petitioners is not raised by the record. It assumes, incorrectly, that in affirming a finding of patent infringement under the doctrine of equivalents, the Court below ignored such factors as the "importance" of a substitution, and the recognized "interchangeability" of structures. To the contrary, the Court below took such factors into consideration.

B. The "Question Presented" was not raised by the Petitioners below. To the contrary, petitioners there explicitly relied upon a three part "function, way and result" standard for deciding doctrine of equivalents cases.

C. The decision below is not in conflict with that of any other court.

D. Section III of the petitioners' argument has nothing to do with their "Question Presented." In any event, the argument is wrong.

II. Counterstatement of the Case

The Federal Circuit's determination of patent infringement, from which review is sought herein, followed the standards set forth in this Court's opinion in *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 339 U.S. 605 (1950).

The Federal Circuit's fact-based decision made no new law. It merely applied the doctrine of equivalents to an incidental claim element, the housing for a novel tissue processing apparatus. In the words of the Court:

> "To allow Shandon to escape infringement simply because it used separate cabinets, as opposed to a single cabinet, is *the exact type of injustice* the doctrine of

> equivalents prevents. This court discerns no clear error in the district court's finding of infringement under the doctrine of equivalents." (A.11) (emphasis added) (citation omitted).

Prior to the invention of the '073 patent in suit, the typical tissue processing device comprised a series of open-topped solution containers, into which human and other tissue specimens were sequentially dipped. These devices permitted the evaporation of substantial quantities of noxious solutions, and the air pollution that went with it.

The '073 patent, now expired, describes an apparatus which substantially eliminates the fumes of these noxious solutions by utilizing a *closed* central processing chamber in which the tissue specimen can be held while a series of solutions are transferred, from *closed* solution containers, to that closed processing chamber, and then returned, through an interlinking piping system.

The District Court found (A.19) and the Federal Circuit confirmed (A.10) that the '073 apparatus is

> "an improvement over the prior art because it represents the first completely automatic system for allowing light microscopy tissue to be processed under a completely automatic sequence in an entirely closed system and without requiring substantial movement of the specimens."

The validity of the '073 patent was upheld by both the District Court and the Federal Circuit.

The invention of the '073 patent overcame the noxious fume problem of the prior art, and the record shows respondents' commercial instruments have met all OSHA standards pertaining to contamination by fumes. Petitioners' infringing apparatus has utilized, *inter alia*, the enclosed central processing chamber, closed solution containers, and interlinking piping system of the '073 patent, and obtains the advantages of the patent.

Claim 1 of the '073 patent sets forth an extremely detailed check list for the tissue processor invention, running some 107 lines of printed text in the patent and three full pages of text in Petitioners' Appendix herein. (A.41-43). Yet both the District Court and Court of Appeals have determined that each of the numerous and detailed requirements of that claim, or its equivalent, has been utilized by petitioners in their infringing apparatus.

Indeed, the only element of the claim found under the doctrine of equivalents (rather than by literal infringement) was an incidental element, the housing ("a cabinet"), found by the District Court to be nothing more than "an enclosure containing the various elements of the device." (A.39).

The Court of Appeals agreed, determining that petitioners' use of three modules for its housing, while the patent claimed one, did not avoid infringement:

> "Regardless of separation into modules, Shandon's system is still a 'completely automatic system for allowing light microscopy tissue to be processed under a completely automatic sequence in an entirely closed system and without requiring substantial movement of the specimens.'" (A.10-11).

III. Reasons for Denying the Writ

A. The Asserted "Question Presented" is Not, in Fact, Presented in this Case. The Federal Circuit Did Take the Factors of Petitioners' Four-Benchmark Test Into Consideration

The doctrine of equivalents originated nearly a century and a half ago in *Winans v. Denmead*, 56 U.S. 330 (1853). It prevents a competitor from pirating the essence of an invention, as set forth in a patent claim, and seeking to avoid infringement merely because he has introduced "minor variations to conceal and shelter the piracy." *Graver Tank*, 339 U.S. at 607.

As this Court recognized, to prohibit only "literal" infringement of the claim

> "would place the inventor at the mercy of verbalism and would be subordinating substance to form." *Ibid.*

Since *Winans*, this Court has, accordingly, repeatedly recognized the doctrine of equivalents as an alternate method to show infringement. *Sanitary Refrigerator Co. v. Winters*, 280 U.S. 30 (1929); *Graver Tank*.

In the decade since it was created to deal with and harmonize the often difficult rules of patent law, the Federal Circuit has adhered to the doctrine of equivalents.

It has additionally fashioned a number of subsidiary rules for the doctrine, including rules directed to its use in jury trials, *Malta v. Schulmerich Carillons, Inc.*, 952 F.2d 1320, 1325 (Fed. Cir. 1991), and rules for the mechanics of its application. *Insta-Foam Products, Inc. v. Universal Foam Systems, Inc.*, 906 F.2d 698, 702 (Fed. Cir. 1990).

In *Graver Tank*, this Court noted, in the course of its opinion, that there were various factors which a trier may consider in deciding whether there is infringement under the doctrine of equivalents. Among them were:

- whether the defendant introduced only "minor variations" in his device, *id.* at 607,
- whether the patent in suit was a "pioneer" or, instead, a "secondary invention," *id.* at 608,
- consideration of the "context of the patent [and] the prior art," *id.* at 609,

as well as the factors expressly relied upon herein by petitioners. (Petition at 12).

The court summed up, stating that the issue of equivalency was "to be decided by the trial court and that court's decision, under general principles of appellate review, should not be disturbed unless clearly erroneous." *Graver Tank* at 610. That is precisely what occurred in the instant case; the Federal Circuit upheld a finding of infringement under the doctrine of equivalents as not clearly erroneous. (A.11).

The "unimportant...substitution" factor, raised here by petitioners (Petition at 12), was obviously satisfied in this case. The claim element found by equivalents was the housing for a novel tissue processing device. The Court of Appeals recognized that it could hardly permit Petitioner Shandon to escape infringement "simply because it used separate cabinets." (A.11).

The "know[ledge]...of...interchangeability" factor raised here by petitioners (Petition at 12) was equally satisfied. Persons skilled in the art testified at trial that they recognized that the patent also covered a housing having several sections, rather than a single section. Moreover, the Federal Circuit expressly determined that this teaching was set forth in the patent itself. (A.10).

The evidence on the copying/independent development factor, raised here by petitioners (Petition at 12) was overwhelmingly against petitioners. It defies belief that a company can build a device utilizing the myriad elements of a patent claim that extends over 107 lines of printed text in the patent, unless there has been piratical copying. As the Federal Circuit pointedly noted, "the doctrine of equivalents prevents the pirating of the patentee's inventions...." (A.9).

Nor is there any evidence of record that the myriad requirements *found in the claim* were independently developed by petitioners. Indeed, petitioners have specifically admitted that their

infringing device was developed with knowledge of respondents' patented tissue processor. (Petition at 4, 13).[1]

Petitioners' "equivalence in fact" factor (Petition at 12) was satisfied by the District Court's finding of equivalents, a finding upheld on appeal by the Federal Circuit. (A.9-10).

In short, there is nothing in the Federal Circuit opinion to indicate that the court failed to consider the factors now highlighted by the petitioners.

B. Petitioners Did Not Assert Their "Question Presented" in the Court Below

In the court below, petitioners did not assert the four "benchmark" standard they urge in their "Question Presented." To the contrary, petitioners urged the Federal Circuit to follow the three part "function, way, and result" test. As they expressly argued in their brief on appeal:

> "The *sine qua non* for infringement by equivalents is the *Graver* three part 'function, way, and result' test. Under that test, a patentee must show that the *accused device* performs substantially the same overall function or work, in substantially the same way, to obtain substantially the same overall result as the *claimed invention*." (Respondents' Appendix at RA 1-2).

Petitioners' argument below was merely directed to the adequacy of the District Court's application of this test. But the Federal Circuit, after careful analysis, upheld the District Court.

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[1] The test for infringement focuses on the requirements of the patent claim, not on what additional elements may be found in an accused device. *Amstar Corp. v. Envirotech Corp.*, 730 F.2d 1476, 1482 (Fed. Cir. 1984). Similarly, the fact that additional elements in defendants' accused device may support a separate patent owned by defendants is not a defense to patent infringement. *Vaupel Textilmaschinen KG v. Meccanica Euro Italia S.P.A.*, 944 F.2d 870, 879 n.4 (Fed. Cir. 1991).

(A. 9-11). Its decision focused, of course, on the arguments actually raised by petitioners in their brief below.

Having urged the Federal Circuit to decide the case under the "three part 'function, way, and result' test," petitioners would be in no position to ask this Court to decide it under the "four 'benchmark'" test of their "Question Presented," even if, contrary to fact, the Federal Circuit had ignored the other factors.

C. The Federal Circuit's Decision Does Not Conflict With That of Any Other Court

The typical rationale for the grant of certiorari is a conflict between circuits in their interpretation of the law. But for the past decade, the Federal Circuit Court of Appeals has had exclusive jurisdiction over appeals in cases based on claims of patent infringement. 28 U.S.C. §§ 1295(a)(1), 1338. Accordingly, the Federal Circuit decision below does not conflict with that of any other court and petitioners do not claim that it does.

D. Section III of Petitioners' Argument Has Nothing to Do with Their "Question Presented"

Petitioners, in Section III of their Petition, argue that, in analyzing the "result" branch of the "function, way, result" test, the Federal Circuit erred by looking to the results of respondents' '460 method patent, not to those of the '073 apparatus patent here in issue. Any relationship of this argument to the "Question Presented for Review" eludes Respondents.

Moreover, on the merits, petitioners' argument is frivolous. The elements recited in claim 1 of the '073 patent (A.41-43) collectively form the "closed processing system" recited in the claim preamble. More specifically, they make up a "completely automatic system for allowing light microscopy tissue to be processed under a completely automatic sequence in an entirely closed system and without requiring substantial movement of the

specimens," the specific results recited in the Federal Circuit's opinion. (A.10-11).[2]

In the course of its opinion, the Federal Circuit made it clear that it viewed the "results" of the '460 process patent to be fluid transfer, by means of pressure and vacuum pumps. (See A.13). Petitioners purport to quote claim 1 of the '460 patent in their Appendix B (A.44), but their recitation is highly misleading in this regard because they fail to set forth all of the language of the claim, omitting the very steps in the claim which recite the crucial application of pressure and vacuum.[3]

The Federal Circuit properly looked to the "results" of the '073 patent here in issue. Even if it did not, it would have nothing to do with the "Question Presented" by petitioners.

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[2] Petitioners urge that the Federal Circuit should have deemed the results of the '073 patent to be "unification." (Petition at 15). But it was petitioners themselves who urged the Court below not to focus on the results of only "one element" of the claim, the cabinet, but to focus instead on "a comparison of the accused device with the claimed device." (RA 2). In any event, as the Federal Circuit made clear, the disclosure and claims of the patent anticipate that the elements will be dispersed. (A.10).

[3] The remaining steps in that process claim are set forth in the Respondents' Appendix at RA 5.

IV. Conclusion

For the reasons set forth above, the Petition for Certiorari should be denied.

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APPENDIX

expert, Mr. Kocsis, even testified during his cross-examination that each module of the Hypercenter is a cabinet. [JA209-210] These facts are undisputed.

The district court stated:

> [T]he modules of the Hypercenter collectively form a cabinet" [JA29]

Clearly implicit in this finding, particularly in the terms "modules" and "collectively" is the fact that the Hypercenter does not have a *single* boxlike structure. Since this is the test of literal infringement using the proper interpretation of "a cabinet", a cabinet is not present and there is no literal infringement.

III. The Lower Court's Doctrine Of Equivalents Analysis Of The '073 Patent Is Legally Incorrect.

A. The district court's analysis is flawed and incomplete.

The district court found that even if the Hypercenter did not literally infringe the '073 patent claims, it would infringe under the doctrine of equivalents "since the Hypercenter modules perform the same function, in the same manner as the cabinet in the instant patent because they represent an enclosure containing the various elements of the device". [JA29] Again, the district court simply adopted Miles' misleading and legally flawed arguments.[29] In particular, the district court never analyzed the "result" part of the *Graver*[30] tripartite equivalency test with respect to the cabinet limitation of the claimed invention.

The *sine qua non* for infringement by equivalents is the *Graver* three part "function, way, and result" test. Under that test, a patentee must show that the *accused device* performs substantially the same overall function or work, in substantially the same way, to obtain substantially the same overall

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[29] *See*, Plaintiffs' Opening Post-Trial Brief [JA2377]

[30] *Graver Tank and Mfg. Co. v. Linde Air Products Co.*, 339 U.S. 605, 608 (1950).

result as the *claimed invention*. *Pennwalt Corp. v. Durand-Wayland, Inc.*, 833 F.2d 931, 934-35, 4 USPQ2d 1737, 1739, (Fed. Cir. 1987) (*en banc*), *cert. denied*, 485 U.S. 961 and 1009 (1988); *Graver*, 339 U.S. at 608. Equivalency is a question of fact which is reviewed by a clearly erroneous standard. *Insta-Foam Prods. Inc. v. Universal Foam Sys. Inc.*, 906 F.2d 698, 702, 15 USPQ2d 1295, 1297 (Fed. Cir. 1990). Nevertheless, an incorrect application of the law of equivalency, as a matter of law, may dictate a remand for fact findings. *Uniroyal v. Rudkin-Wiley*, 837 F.2d 1044, 1057, 5 USPQ2d 1434, 1443 (Fed. Cir. 1988).

In a jury trial, a plaintiff asserting infringement under the doctrine of equivalents must introduce separate evidence and argument on each of the three parts—function, way, and result—of the *Graver* equivalency test. *Nestier Corp. v. Menasha Corporation-Lewisystems Division*, 739 F.2d 1576, 1579 (Fed. Cir. 1984), *cert. denied*, 470 U.S. 1053 (1985); *Lear Siegler, Inc. v. Sealy Mattress Co.*, 873 F.2d 1422, 1426-27 (Fed. Cir. 1989); *Malta v. Schulmerich Carillons, Inc.*, 952 F.2d 1320, 1325, 21 USPQ2d 1161, 1166 (Fed. Cir. 1991). That principle should apply as well in a bench trial and require an analysis of each prong of the *Graver* test. In particular, neither a jury nor a judge is entitled to infer equivalency of result from equivalency of "function and manner". *See, Perkin-Elmer Corp.*, 822 F.2d 1528, 3 USPQ2d 1321 (equivalency of function and result cannot be used to infer equivalency of way).

The district court's analysis is flawed in two respects. First, beyond a conclusory statement of equivalents, the district court made no findings of the "function, way, result" of the accused device vis-a-vis the claimed device. The discussion of the alleged equivalents of one element (modules vs. a cabinet) is insufficient to take the place of a comparison of the accused device with the claimed device. Second, even the analysis of the Hypercenter's modules is flawed because the court failed to determine whether the Hypercenter modules functioned to obtain the same result as the cabinet of the

claimed invention. Thus, at a minimum, a remand for findings on equivalency of the properly construed claim is appropriate.

However, this Court may, at its discretion, conclude that equivalency is negated, as demonstrated in the next section, because Miles failed to offer any evidence at trial which proves that the Hypercenter modules perform their function to obtain the same result as the cabinet of the claimed invention.

B. A correct equivalents analysis yields a conclusion of no infringement.

As noted above, the claim term "cabinet", as properly construed, is a single boxlike structure which *functions to unify the components of the claimed tissue processing system.* Moreover, the '073 patent discloses the following:

> The apparatus is unified in a table mounted cabinet. [JA846, col. 2, lines 22-23]
>
> * * *
>
> The mounting of the air pump 61 and its associated piping and valves in the cabinet provides a unitary and self-contained processing apparatus with obvious advantages. [JA850, col. 10, lines 27-30]
>
> * * *
>
> Also the controls could be mounted in a separate cabinet. However, this also would tend to detract from the many advantages of unifying all the necessary processing and control apparatus in a common table top mounted cabinet. [JA850, col. 10, lines 34-38]

Thus, the result obtained by "a cabinet" in the claimed invention is the unification of the various components.

It is undisputed that the Hypercenter modules do not unify the components of its system. Instead, the separate modules disperse those components for safety reasons and to

gain operational advantages for the user, all at an additional cost of manufacture. *Supra*, pp. 9-10.

For example, a separate module was designed for the solution containers to avoid a fire hazard which would be created if the flammable liquids in the solution containers are located proximate to the electrical circuits associated with the processing chamber, paraffin baths, and controls.[11] [JA1461, 1463] Thus, equivalency between the cabinet of the claimed invention and the Hypercenter modules is negated.

Additionally, there is no evidence in the record to support a conclusion of equivalents between the accused device and the claimed device, nor could there by given the substantial difference in design philosophy between the multiple modules of the accused device and the unitary cabinet of the claimed device. In the absence of evidence of equivalents of the accused device and the claimed device, remand would be pointless: this Court should enter judgment in Shandon's favor.

[11]As noted earlier, the first Kinney/Pickett prototype of the claimed invention was destroyed by fire. *Supra*, p. 11.

Remainder of Claim 1 of the '460 Patent
(Steps Omitted From Recitation of Such
Claim in the Petition for Writ of
Certiorari at A. 44)

"1. establishing a vacuum condition in the chamber and

2. establishing a temperature condition in the chamber for maintaining each such predetermined volume at a selected temperature appropriate to such solution.

3. terminating the vacuum and retaining the solution for a predetermined time at a predetermined pressure and temperature, and

4. at the end of each such period of predetermined time, increasing the pressure in the chamber and thereby forcing the used solution back to its respective said container by pressure such that the selected solutions and melted paraffin are separately and independently pumped by application of vacuum and pressure to said chamber and are exchanged with each group of specimens while such specimens are confined in the chamber, held stationary and physically isolated."

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MOTION TO STAY CONSIDERATION OF PETITION FOR WRIT OF CERTIORARI PENDING CLARIFICATION OF THE FEDERAL CIRCUIT'S IMPENDING TREATMENT OF THE QUESTION RAISED IN THE PETITION

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PARTIES TO THE PROCEEDING

Pursuant to Supreme Court Rules 14.1.(b) and 29.1., the parties to the proceedings in the Court of Appeals for the Federal Circuit were the Petitioners, Shandon Inc. and Shandon Southern Products Limited and the Respondents, Miles Laboratories, Inc. and Triangle Biomedical Equipment, Inc.

The parent companies of the Petitioners are set forth below:

For Shandon Inc.

Parent: - Life Sciences International Inc.
which is wholly owned by Life Sciences International PLC
All subsidiaries are wholly owned.

For Shandon Southern Products Limited (now by change of name, Life Sciences International (Europe) Ltd.)

Parent: - Life Sciences International PLC
All subsidiaries are wholly owned.

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Introduction

On November 24, 1993, Petitioners, Shandon Inc. and Shandon Southern Products Limited ("Shandon"), filed a petition for writ of certiorari to the Federal Circuit regarding that court's application of the doctrine of equivalents to find patent

infringement. The caption of the first reason for granting the writ reads as follows:

> **The Federal Circuit, Whose Charter Was To Unify Decisional Patent Law, Has Lost Touch With The Objective Factors That Bottomed This Court's Decision In *Graver Tank* And Now Subjectively Applies The Doctrine Of Equivalents; As A Result, Uncertainty Abounds.**

Pet. p. 12.

Shandon argues that the Federal Circuit has rotely applied the function/way/result test as the sole criterion for finding infringement under the doctrine of equivalents and thus has disregarded the other three objective benchmarks advanced by *Graver Tank*[1] to justify the application of the doctrine.

On December 3, 1993, nine days after the filing of the petition, the Federal Circuit, *sua sponte*, issued an order to the parties in a pending appeal[2] (to be decided in banc) directing them to file supplemental briefs on three questions only; the first question is:

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1 339 U.S. 605, 608-12 (1950)

2 A copy of the Federal Circuit's order in *Hilton Davis Chemical Co. v. Warner-Jenkinson Company, Inc.*, CAFC, No. 93-1088, is attached as Appendix A.

(1) Does the finding of patent infringement under the doctrine of equivalents require anything in addition to proof of the facts that there are the same or substantially the same (a) function, (b) way, and (c) result, the so-called triple identity test of *Graver Tank Mfg. Co. v. Linde Air Products Co.*, 339 U.S. 605, 85 USPQ 338 (1950), and the cases relied on therein? If yes, what?

There is virtual identity between the question the Federal Circuit intends to decide in banc in *Hilton Davis* and the question Shandon raises for review by this Court. The positive aspect of that identity is the recognition by the Federal Circuit that the issue deserves its in banc consideration. The negative aspect of the identity is the injustice that Shandon will suffer should this Court defer to the Federal Circuit's treatment of the issue in another case and deny Shandon's petition. Having been first in time to raise the question, Shandon at least ought to be positioned to benefit from its resolution.

Shandon's Motion In the Federal Circuit

In order to avoid such injustice, Shandon has filed, on an expedited basis, a motion in the Federal Circuit requesting the following relief:

- The mandate issued by the Federal Circuit be recalled to restore its jurisdiction

- The judgment of the Federal Circuit in this case be opened to permit rehearing on the question of infringement under the doctrine of equivalents
- This appeal in the Federal Circuit be consolidated with that court's in banc consideration of *Hilton Davis*
- The parties in this appeal be permitted to file briefs and argue the questions raised *sua sponte* by the Federal Circuit, at least to the extent that those questions apply to the record in this case
- The decision rendered in banc by the Federal Circuit be applicable to this case

A copy of Shandon's motion (less appendices) in the Federal Circuit is attached as Appendix B.

If the Federal Circuit grants the relief sought by Shandon's motion, Shandon will move this Court to dismiss the instant petition for writ of certiorari.

Shandon's Motion To Stay Consideration

Of The Instant Petition

In view of the foregoing and in the interest of the efficient use of this Court's time, Shandon moves this Court:

- to stay the petition for writ of certiorari pending disposition of Shandon's motion to open

the Federal Circuit's judgment and to permit Shandon to join in the *Hilton Davis* appeal

- if the Federal Circuit denies Shandon the relief sought by its motion, to continue the stay pending a final decision by the Federal Circuit in the *Hilton Davis* appeal because, if that decision favors Shandon's position as set forth in the petition, this Court could summarily reverse the Federal Circuit's judgment in this case on the doctrine of equivalents issue; otherwise, this Court could take up the petition on its merits.

A proposed Order is annexed which requires petitioners promptly to inform the Clerk of this Court in writing of all actions by the Federal Circuit that pertain to this motion.

Respectfully submitted,

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December 20, 1993

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ON MOTION
PROPOSED ORDER

Petitioners have filed a MOTION TO STAY CONSIDERATION OF PETITION FOR WRIT OF CERTIORARI PENDING CLARIFICATION OF THE FEDERAL CIRCUIT'S IMPENDING TREATMENT OF THE QUESTION RAISED IN THE PETITION. Accordingly, IT IS ORDERED that the Petition for Writ of Certiorari filed November 24, 1993 in the matter captioned above shall be stayed pending disposition of Petitioners' MOTION OF DEFENDANTS/APPELLANTS TO RECALL THE MANDATE, OPEN JUDGMENT AND PERMIT APPELLANTS TO FILE A BRIEF ON, AND ARGUE THE ISSUES RAISED IN, THE COURT'S *SUA SPONTE* ORDER IN

HILTON DAVIS CHEMICAL CO. v. WARNER-JENKINSON COMPANY, INC., CAFC, No. 93-1088 to the Court of Appeals for the Federal Circuit.

IT IS FURTHER ORDERED that the stay shall continue pending a final decision by the Court of Appeals for the Federal Circuit in *Hilton Davis Chemical Co. v. Warner-Jenkinson Company, Inc.*, CAFC, No. 93-1088, if Petitioners' aforementioned Motion is denied.

IT IS FURTHER ORDERED that Petitioners promptly will inform the Clerk of this Court in writing of all actions by the Federal Circuit that pertain to this Order.

_____

United States Supreme Court

Dated: _____

APPENDIX A